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## Indemnity Contracts

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the trial court will generally raise the issue sua sponte if the parties do not.<sup>258</sup>

### *Indemnity Contracts*

One area in which *Dole* has been held inapplicable is where an indemnity agreement exists between the parties. In *Williams v. D. A. H. Construction Corp.*,<sup>259</sup> the Appellate Division, Second Department, reversed the trial court's direction of a verdict in favor of the plaintiff and third-party plaintiff, and remanded for a determination of whether the terms of the indemnity contract had been satisfied, *i.e.*, whether the plaintiff's injury was caused by any act or omission by the third-party defendant. The court stated that *Dole* does not apply in this situation.<sup>260</sup> It is notable, however, that while the indemnity agreement controls the third-party plaintiff's claim here, *Dole* would have produced the same effect as the terms of the contract.

### *Court of Claims*

The New York State Constitution establishes the Court of Claims as the exclusive forum for claims against the state.<sup>261</sup> As to claims against all other defendants, however, the court has no competence whatsoever. Because this truncated jurisdiction rules out third-party practice,<sup>262</sup> several actions may be necessary to finally resolve a controversy to which the state is a party. This shortcoming of Court of Claims practice has become all the more apparent since *Dole*.<sup>263</sup> When the

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<sup>258</sup> The Second Department requires the trial court to sua sponte charge the jury with respect to apportionment of fault even absent a crossclaim. *Stein v. Whitehead*, 40 App. Div. 2d 89, 337 N.Y.S.2d 821 (2d Dep't 1972). See also *Lipson v. Gewirtz*, 70 Misc. 2d 599, 602, 334 N.Y.S.2d 662, 665 (Dist. Ct. Nassau County 1972) ("The court on its own initiative is to instruct the jury to fix responsibility among the defendants and apportion damages among those found to be liable.").

<sup>259</sup> 42 App. Div. 2d 877, 346 N.Y.S.2d 862 (2d Dep't 1973) (mem.).

<sup>260</sup> But see *Schwab*, *supra* note 232, at 160-61, where the author states:

If the intent of *Dole*, inter alia, is to broaden the basis of recovery and to induce otherwise reluctant litigants to contribute towards a settlement, surely the contractual indemnification case law of New York, as recent as it is, accomplishes a contrary result.

<sup>261</sup> The court has jurisdiction over "claims against the state or by the state against the claimant or between conflicting claimants as the legislature may provide." N.Y. CONSR. art. 4, § 9. See generally *McNamara, The Court of Claims: Its Development and Present Role in the Unified Court System*, 40 ST. JOHN'S L. REV. 1 (1965); *Jurisdiction of the Court of Claims, Consolidation into the Supreme Court*, in SECOND ANNUAL REPORT OF THE N.Y. JUDICIAL CONFERENCE 94 (1957).

<sup>262</sup> See *Horoch v. State*, 286 App. Div. 303, 143 N.Y.S.2d 327 (3d Dep't 1955). Trial by jury is not available in the Court of Claims. N.Y. Cr. Cl. Acr § 12(3) (McKinney 1963). Impleader by the state would, therefore, deprive a third-party defendant of a constitutionally guaranteed right. N.Y. CONSR. art 1, § 2.

<sup>263</sup> See *Bartlett v. State*, 40 App. Div. 2d 267, 340 N.Y.S.2d 66 (4th Dep't 1973) (state may not seek a *Dole* apportionment in the Court of Claims).